85-334

No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FIRESTONE TIRE & RUBBER COMPANY and
OCCIDENTAL CHEMICAL CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court is prohibited from determining that a regulation is not an emission standard in civil enforcement actions under the Clean Air Act ("CAA" or "Act"), even though it has such authority in criminal enforcement proceedings under the Act.

2. Whether 40 C.F.R. § 61.65(a) is an emission standard within the meaning of Section 112 of the Act, even though it does not require a quantitative limit on emissions.

LIST OF ALL PARTIES

Petitioners are Firestone Tire and Rubber Company ("Firestone")[1] and Occidental Chemical Cor-

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[1] Firestone's subsidiaries and affiliates are: ASC/AWI Inc.; Brema S.p.A.; Commercial Real Estate Development Inc.; Firestone de la Argentina S.A.I.C.; Firestone Belgium S.A., N.V.; Firestone Canada Inc. Dayton Tire Canada Ltd; Firestone (Ceylon) Limited; Firestone de Chile, S.A.I.C.; Firestone Credit Corporation; Firestone Deutschland GmbH-Engelhardt Reifen GmbH, Engelhardt Reifen GmbH & Co.; Firestone East Africa (1969) Limited; Firestone Far East Company; Firestone France S.A.; Firestone Interamerica Company; Firestone International Development S.p.A.; Firestone International Europe Inc.; Firestone International Sales Corporation; Firestone Malaya Sdn. Berhad; Firestone N.Z. Limited-Firestone Tire & Rubber Company of New Zealand Limited, Northern Tyre Company (1975) Limited; Firestone Naderland B.V.-Pardel Autobanden-en Servicebaddrif B.V.; Firestone Plantations Company-Lone Star Transport Lines Inc.; Firestone Portuguesa S.A.R.L.; Firestone Puerto Rico Inc.; Firestone Scandinavia A.B.; Firestone (Schweiz) A.G.; Firestone Singapore Private Limited; Firestone (Uganda) Limited; Firestone UK Limited-Albany Tyre Service Limited, Firestone Burleigh Ma-

poration ("Occidental").[2]

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rine Pneumatic Fendering Company Limited-Seiberling Rubber Company (Great Britain) Limited, Tyre & Auto Service Limited, Blackstripe Limited, Worldwide Carriers Limited; Firestone Venezolana C.A.-Nuevos Horizontes C.V.; Hamill de Mexico S.A. de C.V.; Harbell Fire & Casualty Co. Ltd.-Xylos Assurance Limited; Harbel Tapper Corporation; Industria Firestone de Costa Rica S.A.; Industria de Pneumaticos Firestone S.A.-Firestone del Paraguay S.A.; L. & C. Marina Transport Ltd.-L. & C. II Limited, L & C. III Limited; Liberian Metal Processing Incorporated; MHF Inc.; United States Liberia Radio Corporation; United States Trading Company; and Wrexham Tyre Company Limited.

[2] Occidental Petroleum Corporation is the parent corporation of over 500 subsidiaries, including Occidental Chemical Corporation. The other major subsidiaries of Occidental Petroleum Corporation are: Cities Service Company; Island Creek Coal Company; IBP, Inc., formerly known as Iowa Beef Processors, Inc.; Occidental Oil & Gas Corporation; International Ore & Fertilizer Corporation; Occidental Chemical Holding Corporation; and Occidental Chemical Corporation.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported in *United States* v. *Ethyl Corporation,* 761 F.2d 1153 (5th Cir. 1985). The decision of the United States District Court for the Middle District of Louisiana in *United States* v. *Occidental Chemical Corporation,* (M.D. La. 1983), is unreported; that decision is based on the opinion by

the same judge in *United States* v. *Ethyl Corporation*, 576 F. Supp. 80 (M.D. La. 1983). These three opinions are reproduced in Appendix A.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 3, 1985. *See United States* v. *Ethyl Corporation*, 761 F.2d at 1153. This petition for a writ of *certiorari* has been timely filed pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The statutory and regulatory provisions relevant to this petition are Sections 112, 113 and 307(b) of the Clean Air Act, 42 U.S.C. §§ 7412, 7413, and 7607(b), and 40 C.F.R. § 61.65(a). These provisions are reproduced verbatim in Appendices B and C.

STATEMENT OF THE CASE

This petition for *certiorari* is before the Court because the court below refused to apply this Court's decision in *Adamo Wrecking Company* v. *United States*, 434 U.S. 275 (1978) to the case at bar. Instead of following binding precedent, the Fifth Circuit created a theory of adjudicatory authority that directly contradicts *Adamo*. Because the Fifth Circuit refused to follow an opinion of this Court and because its opinion has a direct and substantial impact on 12 pending Clean Air Act enforcement actions, petitioners' writ should be granted.

On July 7, 1983, the United States brought suit against Firestone and Occidental alleging that petitioners discharged vinyl chloride from relief valves in violation of 40 C.F.R. § 61.65(a).[1] Jurisdiction was based upon Section 113(b) of the Act, which authorizes the Government to commence in federal district court civil actions alleging violations of Section 112 of the CAA. 42 U.S.C. § 7413(b). The instant case is one of at least 18 lawsuits filed by the Government since 1982, charging numerous manufacturers of vinyl chloride and polyvinyl chloride ("PVC") with violations of 40 C.F.R. § 61.65(a). Although 6 of these cases have settled,[2] 12 are still pending.[3]

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[1] 40 C.F.R. § 61.65(a) states:

> (a) *Relief valve discharge.* Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge. Within 10 days of any relief valve discharge, the owner or operator of the source from which the relief valve discharge occurs shall submit to the Administrator a report in writing containing information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges.

[2] U.S. v. Air Products & Chemicals, Inc. (W.D. Ky. 1983); U.S. v. Borden, Inc. (D. Mass. 1985); U.S. v. Shell Oil Company (E.D. La. 1985); U.S. v. Conoco, Inc., No. 83-1916-E (W.D. Okla. 1985); U.S. v. Conoco, Inc., No. EC-37-LS-P (N.D. Miss. 1985); U.S. v. Conoco, Inc., No. 83-2518 (W.D. La. 1985).

[3] U.S. v. BFGoodrich, No. C82-1043-P(J) (W.D. Ky.); U.S. v. BFGoodrich and Goodyear Tire and Rubber Company, No. 83-1337-B (M.D. La.); U.S. v. BFGoodrich, No. C83-0456-L(A) (W.D. Ky.); U.S. v. Borden, Inc., No. 83-982 (M.D. La.); U.S.

In the district court petitioners moved to dismiss the complaints. Petitioners argued that 40 C.F.R. § 61.65(a) is not an emission standard, but a work practice standard, based on the language of the regulation, EPA enforcement memoranda interpreting that regulation, the relief sought by EPA in the instant and other enforcement actions, and the type of evidence required from the Government to prove that a defendant violated Section 61.65(a). Under controlling Supreme Court precedent, if Section 61.65(a) is a work practice standard, it is unenforceable, and the complaints against petitioners must be dismissed. *Adamo Wrecking Company* v. *United States,* 434 U.S. at 285-89.

On October 7, 1983, the district court held that 40 C.F.R. § 61.65(a) was a work practice standard and dismissed the litigation; the district court followed its previous opinion in *United States* v. *Ethyl Corporation,* 576 F. Supp. at 80. The Government appealed both decisions, and the cases were consolidated on appeal. On June 3, 1985, the Fifth Circuit reversed the district court, holding that Section 307(b)(2) of the Act, 42 U.S.C. § 7607(b)(2), prohibited the district court from determining that 40 C.F.R. § 61.65(a) is not an emission standard within the meaning of Section 112. *United States* v. *Ethyl Corporation,* 761

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v. Borden, Inc. and Monochem, Inc., No. 83-744-B (M.D. La.); U.S. v. Georgia Pacific Corporation, No. 84-457-B (M.D. La.); U.S. v. PPG Industries, Inc., No. CV 48-0331 (W.D. La.); U.S. v. The Dow Chemical Company, No. 85-294-A (M.D. La.); U.S. v. Formosa Plastics Corp., La. and ICI Americas, Inc., No. 84-78-B (M.D. La.); and United States v. The Dow Chemical Company, No. H-85-4665 (S.D. Tx.).

F.2d at 1153-55. The court of appeals distinguished *Adamo* from this litigation on only one ground, *viz.*, that *Adamo* involved a criminal prosecution, while the claims against petitioners are civil in nature. *Id.* at 1155-56.

There is no material difference between this suit and *Adamo*. Like *Adamo*, this case involves a district court determination that a regulation sought to be enforced is a work practice standard, not an emission standard, and therefore is unenforceable. As in *Adamo*, the appellate court reversed, claiming that the district court lacked jurisdiction to determine that the regulation is not an emission standard. As in *Adamo*, this Court should grant the writ sought by petitioners, reverse the court of appeals, and reinstate the opinion of the district court.

REASONS TO GRANT WRIT

I. This Petition for Certiorari Should Be Granted Because the Fifth Circuit's Decision Limiting District Court Jurisdiction Is Contrary to This Court's Decision in *Adamo* and to Section 307(b) of the Act.

The Fifth Circuit erroneously held that Section 307 (b) of the Act deprived the district court of jurisdiction to examine the complaint before it and determine whether the regulation the Government seeks to enforce is an emission standard. *United States* v. *Ethyl Corporation*, 761 F.2d at 1154-55. Section 307 (b) of the Act provides, in pertinent part:

> (b)(1) A petition for review of action of the Administrator in promulgating any . . . emission standard . . . under section [112] . . . may be

> filed only in the United States Court of Appeals for the District of Columbia.
>
> * * * *
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

42 U.S.C. § 7607(b).[4] As this Court specifically held in *Adamo,* Section 307(b)(2) "does not relieve the Government of the duty of proving . . . that the regulation allegedly violated is an emission standard." 434 U.S. at 284. Such proof involves showing that the regulation in question requires a "quantitative limit on emissions" rather than imposition of "pollution control techniques." *Id.* at 285-86. Because the Government must prove that 40 C.F.R. § 61.65(a) is an emission standard, the district court *a fortiori* must have jurisdiction to determine whether that regulation is an emission standard. As the district court correctly held, the Government failed to meet this burden in the instant case. *See United States* v. *Ethyl Corporation,* 576 F. Supp. at 86.

To deny the district court adjudicatory authority, the court below seized upon the one difference be-

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[4] The words "or requirement" have been deleted as they were added to Section 307(b) in the 1977 amendments to the Clean Air Act so that work practice regulations promulgated after enactment of the amendments would be accorded the same treatment as emission standards. Adamo Wrecking Company v. U.S., 434 U.S. at 289. It is undisputed that because the regulations at issue here were promulgated before the 1977 amendments, *see* 41 Fed. Reg. 46,560 (1976), the words "or requirement" are not involved in this litigation.

tween *Adamo* and the instant case: the Government filed a criminal complaint against Adamo, while it filed civil actions against the petitioners here. *United States* v. *Ethyl Corporation*, 761 F.2d at 1155-56. Reliance on this distinction for jurisdictional purposes is unsupported by the Act, contravenes a prior opinion of this Court, and is belied by common sense. By its terms, Section 307(b) permits judicial review of the same subject matter in *both* "civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2). The Act itself provides no basis for denying the district court jurisdiction to determine whether a regulation is an emission standard in civil litigation when it provides authority to conduct the same inquiry in a criminal enforcement proceeding.

Moreover, the statutory framework belies any intent by Congress to provide adjudicatory authority in criminal but not in civil enforcement proceedings. There is no meaningful difference between the penalties available in civil and criminal actions—in either event the Act provides for penalties of up to $25,000 for each day the Clean Air Act is violated. Both types of action are penal, and although prison sentences may be imposed only for criminal convictions, such sentences have not been sought by the United States since *Adamo*, and to date have never been imposed in litigation to enforce Section 112. 42 U.S.C. § 7413(b) and (c).

Furthermore, the Fifth Circuit's decision is inconsistent with the unanimous opinion of this Court in *Federal Communications Commission* v. *American Broadcasting Company*, 347 U.S. 284, 296 (1954). In that litigation, this Court held that statutory provi-

sions must be accorded the same construction in both criminal and civil enforcement proceedings. Rejecting the interpretation of the statute sought by the Commission, this Court stated:

> It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for [civil enforcement] . . . and another for [criminal enforcement] . . . . If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained . . . it would do violence to the well-established principle that penal statutes are to be construed strictly.

The decision by the court below denying the district court the authority to determine whether 40 C.F.R. § 61.65(a) is an emission standard, merely because the instant case is a civil rather than criminal enforcement proceeding, is contrary to law and should be reversed.

Indeed, the Fifth Circuit's decision makes no sense; it withholds from Firestone, Occidental, and other defendants charged with innocent or negligent violations of the Act a right accorded those charged with knowingly or intentionally conducting the same activity. Under the Act, the same facts, *e.g.*, relief valve discharges allegedly regulated by 40 C.F.R. § 61.65(a), provide the basis for either a criminal or civil enforcement action; the only statutory distinction between civil and criminal enforcement is one of intent. 42 U.S.C. § 7413(b) and (c). Pursuant to *Adamo*, a defendant charged with deliberately discharging vinyl chloride into the atmosphere from a relief valve is

free to allege—and the district court has authority to decide—that 40 C.F.R. § 61.65(a) is not an emission standard. Under the Fifth Circuit's decision in this case, however, a defendant charged with an inadvertent relief valve discharge is prohibited from raising, and the district court is precluded from entertaining, the same claim. This result is irrational, contrary to the decision of this Court in *Federal Communications Commission* v. *American Broadcasting Company, supra,* and in direct conflict with the Third Circuit's opinion in *Hooker Chemical Company* v. *United States,* 642 F.2d 48, 53 n.3 (3d Cir. 1981).[5] The district court's adjudicatory authority is identical in civil and criminal enforcement proceedings; the Fifth Circuit's decision to the contrary must be reversed.

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[5] In *Hooker* the court dismissed as not justiciable Hooker's claim that EPA had improperly issued a civil administrative enforcement order pursuant to Section 113(a). 42 U.S.C. § 7413(a). The court reached its conclusion by reasoning that, *inter alia,* Hooker could raise an *Adamo* defense in an enforcement proceeding, stating:

> Hooker invokes *Adamo Wrecking, supra,* in challenging the employment of § 61.65(a) to support a § 113(a) emission standard violation. Because the § 113 order has been withdrawn, *and Hooker would be able to raise the alleged infirmity as a defense in enforcement proceedings,* we would be rendering an advisory opinion to consider the matter on the merits at this stage.

Id. (emphasis added). Thus, the Third Circuit decided—contrary to the decision of the court below—that a district court has jurisdiction in civil enforcement proceedings such as the instant case to determine whether a regulation is an emission standard within the meaning of the CAA.

II. This Petition for Certiorari Should Be Granted Because the Fifth Circuit's Decision That 40 C.F.R. § 61.65(a) Is an Emission Standard for Jurisdictional Purposes Is Contrary to This Court's Decision in *Adamo* and to Section 112 of the Act.

As an afterthought, the Fifth Circuit held that 40 C.F.R. § 61.65(a) was "on its face" an emission standard. *United States* v. *Ethyl Corporation,* 761 F.2d at 1157-58. That court, for some reason not explained in its opinion, refused to conduct any meaningful inquiry into the content of the regulation. Instead, it accepted the description of the regulation contained in the Government's brief, a description inconsistent with EPA enforcement memoranda interpreting that regulation. The Fifth Circuit's total failure to conduct even a preliminary analysis into EPA's contemporaneous interpretation of its own regulation was patently erroneous and should be reversed. *See American Textile Manufacturers Institute* v. *Donovan,* 452 U.S. 490, 539 (1981); *Adamo Wrecking Company* v. *United States,* 434 U.S. at 287 n.5.

Unlike the Fifth Circuit, the district court conducted the proper inquiry, and concluded that Section 61.65(a) as promulgated, interpreted, and enforced by EPA is a work practice standard, not an emission standard. *United States* v. *Ethyl Corporation,* 576 F. Supp. at 86. That regulation states: "[e]xcept for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service." An emergency discharge is not described in traditional *force majeure* language, but instead is defined as a discharge that "could not have been avoided by *taking measures to prevent the discharge.*" 40 C.F.R. § 61.65

(a) (emphasis added). The regulation also requires a facility that experienced a discharge to notify EPA regarding "the action that was taken to prevent the discharge and measures adopted to prevent future discharges." *Id.* The regulation on its face is not an emission standard because it does not establish a "quantitative limit on emissions." *Adamo Wrecking Company* v. *United States,* 434 U.S. at 286. Rather, it requires utilization of "pollution control techniques," the hallmark of a work practice standard. *Id.* at 285.

As the Fifth Circuit held in *PPG Industries, Inc.* v. *Harrison,* 660 F.2d 628, 636 (5th Cir. 1981), the reviewing court should determine what a regulation requires by scrutinizing "the manner in which [EPA] has applied the emission limitations. . . ." Had the court of appeals conducted such an inquiry, it would have reviewed the EPA enforcement memoranda, attached in Appendix D, which demonstrate that the agency interprets 40 C.F.R. § 61.65(a) to be a work practice standard and enforces the regulation consistent with this interpretation. For example, an EPA enforcement directive dated April 24, 1979, from EPA's Director of Stationary Source Enforcement, states that for a discharge to be permitted by 40 C.F.R. § 61.65(a):

> As a minimum, the source would have to demonstrate that the discharge could not have been prevented by implementing any of the [following:]
>
> 1) employee training programs including instruction on emergency procedures,
>
> 2) equipment inspection and maintenance programs,

3) proper design and operation of process and control equipment, and

4) installation and operation of all control equipment needed to comply with the vinyl chloride standard.

The directive continues:

> The preamble to the proposed vinyl chloride standard lists, on page 59539, several measures a source can reasonably be expected to take to prevent relief valve discharges. Measures which can be taken to prevent discharges from PVC reactors include, but are not limited to, the following:
>
> 1) properly instrumenting the reactors to detect upset conditions,
>
> 2) injecting chemicals to stop the polymerization reaction during upset conditions,
>
> 3) venting the reactor contents to a gasholder during upset conditions and ultimately to a recovery system,
>
> 4) providing employees with improved training on preventing and handling upset conditions, and
>
> 5) maintaining a backup source of power.

These measures are derived almost verbatim from the preamble to Section 61.65(a). *See* 40 Fed. Reg. 59,539 (1975).

Another EPA enforcement memorandum, dated March 14, 1980, states:

> Not all relief valve discharges can be prevented. The intent of the regulation was that *if a plant took steps such as those named above and still had a relief valve discharge, that relief valve dis-*

> *charge would be considered an emergency condition and would not be a violation.*

(Emphasis added.)

These memoranda conclusively reveal that relief valve discharges are expected; no regulated facility can or is required to reduce such discharges to zero. Owners and operators of regulated facilities must perform specific work practices, however; otherwise, discharges are deemed violations of 40 C.F.R. § 61.65 (a). Consequently, none of the 12 complaints in the pending vinyl chloride cases seek injunctions requiring that discharges be limited to any specific quantity of vinyl chloride; instead, they all request imposition of work practices. For example, the complaint in this action seeks, *inter alia:*

> (b) A permanent injunction requiring the installation of any necessary monitoring and/or containment equipment to prevent discharges of vinyl chloride, the development of a preventive inspection and maintenance plan for equipment in vinyl chloride service, an improved program for investigating and preventing relief valve discharges, the issuance of written publicized procedures for operators to prevent or ameliorate relief valve discharges and the establishment of frequent operator training sessions[.]

This request for specific work practices, identical in all 12 of the cases pending to enforce 40 C.F.R. § 61.65(a), shows that that regulation is a work practice standard, not an emission standard. The Fifth Circuit's refusal to even consider EPA enforcement memoranda and enforcement practices and interpret 40 C.F.R. § 61.65(a) consistent therewith was con-

trary to law and should be reversed by this Court. *See, e.g., Community for Creative Non-Violence* v. *Watt,* 670 F.2d 1213, 1216 (D.C. Cir. 1982); *PPG Industries, Inc.* v. *Harrison,* 660 F.2d at 636; *W. G. Cosby Transfer & Storage Corp.* v. *Froehlke,* 480 F.2d 498, 501-02 (4th Cir. 1973).

CONCLUSION

Because the decision of the court below is contrary to Supreme Court precedent and the Clean Air Act and has a substantial impact on these and many other pending enforcement actions, this petition for *certiorari* should be granted.

Respectfully submitted,

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APPENDICES

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2. EPA Memorandum dated March 14, 1980 from David Hawkins, Assistant Administrator for Air, Noise and Radiation from Rebecca Hanmer, Regional Administrator, Region IV re Vinyl Chloride Standard - Safety Relief Valve Discharges 50a

APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Nos. 83-3537, 83-3656.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ETHYL CORPORATION,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

OCCIDENTAL CHEMICAL CORPORATION and
FIRESTONE TIRE AND RUBBER CO.,
Defendants-Appellees.

June 3, 1985.

United States Environmental Protection Agency instituted civil enforcement proceedings in Federal District Court against two companies seeking damages and injunctive relief on claim that companies had exceeded allowable emission levels of vinyl chloride and polyvinyl chloride under manual vent valve and relief valve regulations promulgated under Clear Air Act. The United States District Court for the Middle District of Louisiana, John V. Parker, Chief Judge, 576 F.Supp. 80, entered an order dismissing complaints for failure to state a claim upon finding that regulations had been promulgated in excess of EPA's authority under Clean Air Act. An appeal was taken. The Court of Appeals, Goldberg, Circuit Judge,

held that District Court lacked subject-matter jurisdiction to consider substantive validity of regulations.

Reversed and remanded.

Stanford O. Bardwell, Jr., U.S. Atty., Baton Rouge, La., Anne S. Almy, Robert L. Klarquist, Appellate Section, Ruth McQuade, Environmental Enforcement Section, Land & Nat. Resources Div., U.S. Dept. of Justice, Washington, D.C., R. Gordon Kean, Baton Rouge, La., for plaintiff-appellant.

Richard Marshall Lavers, Baton Rouge, La., Baker and Botts, F. Walter Conrad, Jr., Martin L. McGregor, Houston, Tex., for Ethyl Corp.

Stephen S. Livingston, Carolyn M. Brown, Dallas, Tex., Horace C. Lane, Baton Rouge, La., for Occidental Chemical.

Gary H. Baise, Robert Brager, Washington, D.C., for Firestone.

Appeals from the United States District Court for the Middle District of Louisiana.

Before CLARK, Chief Judge, GOLDBERG and RUBIN, Circuit Judges.

GOLDBERG, Circuit Judge:

The United States Environmental Protection Agency ("EPA") instituted these two consolidated civil enforcement proceedings in federal district court, one against appellee Ethyl Corporation, the other against appellees Occidental Chemical Corporation and Firestone Tire and Rubber Company. The EPA sought damages and injunctive relief, claiming that the companies had exceeded the

allowable emission levels of vinyl chloride and polyvinyl chloride under the manual vent valve and relief valve regulations published at 40 C.F.R. §§ 61.64(a)(3), 61.65 (a)(1984).[1] The district court ruled that the regulations had been promulgated in excess of the EPA's authority under the Clean Air Act ("Act") § 112, 42 U.S.C. § 7412 (1982), and therefore dismissed the complaints for failure to state a claim under Fed.R.Civ.P. 12(b)(6). Because the district court lacked subject matter jurisdiction to consider the substantive validity of the regulations, we reverse.

In 1970, Congress amended the Clean Air Act to authorize the Administrator of the EPA to promulgate national "emission standards" for hazardous air pollutants.[2] Pub.

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[1] The language of § 61.64(a)(3) and § 61.65(a) is identical except as to the substance being discharged ("polyvinyl chloride" versus "vinyl chloride") and the type of valve involved ("manual vent valve" versus "relief valve"). The latter provision states in pertinent part:

> (a) *Relief valve discharge.* Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge.

40 C.F.R. § 61.65(a).

[2] As defined in the 1970 amendments, "[t]he terms 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality" or serious disease. Pub.L. No. 91-604, § 112, 84 Stat. 1685 (1970). While the 1977 Clean Air Act Amendments altered that definition, *see* 42 U.S.C. § 7412(a)(1), vinyl chloride and polyvinyl chloride were listed as hazardous air pollutants at the time of appellants' alleged violations between 1977 and 1982, 40 Fed.

L. No. 91-604, § 112(b)(1)(B), 84 Stat. 1685 (1970) (codified as amended at 42 U.S.C. § 7412(b)(1)(B) (1982)). Section 112 directed the Administrator to publish a list of hazardous air pollutants and to prescribe for each an emission standard affording an ample margin for safety. 42 U.S.C. § 7412(b)(1)(A), (B). Emission standards limit the amount of hazardous air pollutants that can be discharged into the environment. Unlike "work practice standards," emission standards do not tell companies how to discharge—they only say how much. Under the 1970 amendments, the EPA was permitted to promulgate only emission standards, not work practice standards.[3]

As with most congressional delegations of lawmaking by rule, the Act left it to the Administrator to pour content into these relatively broad concepts. The statute was and is clear about one thing, however: an emission standard is subject to judicial review only in the United States Court of Appeals for the District of Columbia, and only if the petition for review is filed within sixty

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Reg. 59,477 (1975), and they remain listed as such, 41 Fed.Reg. 46,564 (1977) (codified at 40 C.F.R. § 61.60 (1984)).

[3] In 1977, Congress amended section 112 to authorize the Administrator to dictate the "how" as well as the "how much." The new section 112 authorizes the promulgation of work practice standards where it is "not feasible" to prescribe numerical emissions limitations either because the hazardous pollutant cannot be emitted through a conveyance or cannot be measured. Pub.L. 95-95, § 112(e)(1), (2), 92 Stat. 791 (1977) (codified at 42 U.S.C. § 7412(e)(1), (2)). While the Administrator can now promulgate a "design, equipment, work practice or operational standard" as well as an emission standard, work practice standards promulgated prior to the effective date of the 1977 amendments are invalid for being in excess of the Administrator's authority under the Act. *PPG Indus. v. Harrison*, 660 F.2d 628, 636 (5th Cir. 1981).

days of the Administrator's action.[4] *Id.* § 7607(b)(1). Given this limited forum for judicial relief, the statute further contains a preclusive review provision, which states that any "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." *Id.* § 7607 (b)(2). In the present case, the Administrator's "action" occurred on October 20, 1976, when the vinyl and polyvinyl chloride regulations were promulgated. *See* 41 Fed. Reg. 46,564 (1976).[5] Appellees, however, did not challenge the substantive validity of the regulations until 1983, when they filed their motions to dismiss in the present enforcement actions. At least on its face, then, section 307(b) divested the district court of jurisdiction to pass on the substantive validity of these regulations over five years after they should have been contested, if at all. *Luckie v. EPA*, 752 F.2d 454, 456-57 (9th Cir.1985); *United States v. Borden, Inc.*, 572 F.Supp. 684, 690-91 (D.Mass. 1983); *see Lubrizol Corp. v. Train*, 547 F.2d 310, 311-19 (6th Cir. 1976).

Our inquiry might have ended here were it not for the Supreme Court's decision in *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 98 S.Ct. 566, 54 L.Ed.2d 538

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[4] Prior to the 1977 amendments, this time period was 30 days. *See* Pub.L. No. 91-604, § 307(b)(1), 84 Stat. 1676 (1970) (current version at 42 U.S.C. § 7607(b)(1) (1982)).

[5] Although the Administrator has recommended revising the vinyl chloride regulations, *see* 50 Fed.Reg. 1182 (1985) (to be codified at 40 C.F.R. pt. 61) (proposed Jan. 9, 1985), the proposed regulations, if adopted, would not affect these enforcement actions. *See, e.g., National Indep. Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 393 n. 4, 96 S.Ct. 809, 812 n. 4, 46 L.Ed. 580 (1976); *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1262-63 (5th Cir. 1980).

(1978). In *Adamo Wrecking,* the Court held that, despite the clear language of section 307(b), a criminal defendant charged with violating an EPA emission standard under section 113(c) of the Act, 42 U.S.C. §7413(c)(1)(C), could challenge the Administrator's designation of the regulation as an emission standard. 434 U.S. at 284-85. Seizing this opening for judicial review, the court below ruled that the vinyl and polyvinyl regulations are emission standards in name only. 576 F.Supp. 80, 86 (M.D.La. 1983). In the district court's view, the regulations, rather than merely prescribing a numerical limit for relief valve discharges of vinyl chloride, instead required compliance with specific work practices. The court reasoned that, since the determination of whether a discharge "could not have been avoided" turned on the companies' compliance or noncompliance with certain work practices, the regulation could not fairly be termed an emission standard solely by virtue of its "no discharge" requirement. Since the agency lacked authority to promulgate work practice standards at the time these regulations were promulgated,[6] the district court held the regulations to be invalid and hence dismissed the complaints.

Adamo Wrecking, however, does not control this case. To the contrary, the Court rested its holding in *Adamo* on the nature of a criminal prosecution and the attendant unfairness that would result from disallowing a district court to assess the validity of a regulation whose violation would incur the possibility of severe fines and imprisonment. The Court's opinion implicitly acknowledged that, had it not been for the totality of the Act's structure with regard to criminal enforcement proceedings, the clear language of section 307(b) would have compelled a finding that Congress intended to divest the federal courts of jurisdiction over section 112 challenges in all enforcement

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[6] *See* note 3 *supra.*

proceedings, criminal as well as civil. *See Adamo Wrecking*, 434 U.S. at 284, 98 S.Ct. at 572. The Court's *ratio decidendi* was unambiguous:

> *Since Congress chose to attach these stringent* [*criminal*] *sanctions* to the violation of an emission standard, in contrast to the violation of various other kinds of orders that might be issued by the Administrator, it is crucial to determine whether the Administrator's mere designation of a regulation as an 'emission standard' is conclusive as to its character.

Id. at 283, 98 S.Ct. at 572 (emphasis added). In addition, faced with an admittedly unclear indication of the congressional intent underlying section 307(b)'s preclusive effect in criminal prosecutions, the Court further relied on "the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'" *Id.* at 285, 98 S.Ct. at 572-73 (citations omitted). Neither rationale is applicable in the context of civil proceedings. In light of section 307(b)'s clear language and Congress's manifest intent to avoid protracted and inconsistent adjudications over the validity of EPA emission standards,[7] we would be remiss to allow the

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[7] The Senate Report observed that prompt resolution of certain EPA actions in a single judicial forum was desirable "[b]ecause many of these administrative actions are national in scope and require even and consistent national application." S.Rep. No. 1196, 91st Cong., 2d Sess. 441 (1970); *see also Adamo Wrecking*, 434 U.S. at 284, 98 S.Ct. at 572 (noting § 307(b)(2)'s "twin congressional purposes of insuring that the substantive provisions of the standard would be uniformly applied and interpreted and that the circumstances of its adoption would be quickly reviewed by a single court intimately familiar with administrative procedures"); *Chrysler Corp. v. EPA*, 600 F.2d 904, 910-12 (D.C.Cir. 1979); *Lubrizol Corp. v. Train*, 547 F.2d 310, 311-17 (6th Cir.1976); *Natural Resources Defense Council, Inc. v. EPA*, 512 F.2d 1351, 1353-56 (D.C.

narrow holding of *Adamo Wrecking* to bulldoze the statute's jurisdictional limitations in civil enforcement proceedings.[8] *Cf. Yakus v. United States*, 321 U.S. 414, 64

Cir.1975); *Granite City Steel Co. v. EPA*, 501 F.2d 925, 926 (7th Cir. 1974).

This assessment of congressional intent echoes our recent decision in *RSR Corp. v. Donovan*, 747 F.2d 294 (5th Cir.1984). In *RSR Corp.*, we examined the effect of § 6(f) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 655(f) (1982), which constitutes the exclusive vehicle for pre-enforcement review of standards promulgated under OSHA, but which does not speak to the preclusive effect of that act on a federal court's jurisdiction to hear regulatory challenges that arise in the context of OSHA enforcement proceedings. We stated that

> when an employer has participated in the rulemaking and pre-enforcement review of an OSHA regulation and could have then asserted either a substantive or procedural challenge to its validity, but did not, and has no excuse for its failure to do so, we will not entertain the challenge in an enforcement proceeding.

747 F.2d at 302. *A fortiori*, to the extent we discerned that Congress intended to foreclose judicial review under the circumstances of *RSR Corp.*, there is little room for doubt regarding congressional intent where, as here, the relevant statute speaks not only to the existence and nature of pre-enforcement review but also to the non-existence of enforcement-*cum*-review. *Compare, e.g., Shell Oil Co. v. FERC*, 707 F.2d 230, 235 (5th Cir.1983) ("Anyone aggrieved by a rule established in a rulemaking must challenge it within the prescribed appeal period or forever hold his peace.") *with Texas v. United States*, 749 F.2d 1144, 1146-47 (5th Cir.1985) (construing 60-day provision for judicial review in Administrative Orders Review Act of 1950 ("Hobbs Act"), 28 U.S.C. § 2344 (1982), not to preclude all substantive challenges to rule's validity when the rule is later applied).

[8] Concurring in *Adamo Wrecking*, Justice Powell expressed concern over the due process implications of section 307(b)'s jurisdic-

S.Ct. 660, 88 L.Ed. 834 (1944) (upholding previous attempt by Congress, in the context of criminal enforcement proceedings, to require that the validity of regulatory action be challenged in a particular court at a particular time).

Moreover, even if *Adamo Wrecking* were applicable to the case at hand, we would at most be allowed to inquire whether the regulations constitute emission standards on their face.* Assuming for the moment that this limited inquiry is warranted, we take heed of the Court's cautionary words in *Adamo Wrecking:*

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tional limitations, at least in the context of a criminal prosecution. 434 U.S. at 289-91, 98 S.Ct. at 575-76 (Powell, J., concurring); *see also id.* at 293 n.*, 98 S.Ct. at 577 n.* (Stewart, J., dissenting). Like the Court in *Adamo Wrecking,* we are not presented with any challenge based on the due process theory that section 307(b) affords interested parties inadequate notice. *See Harrison v. PPG Indus.,* 446 U.S. 578, 592 n. 9, 100 S.Ct. 1889, 1897 n. 9, 64 L.Ed. 2d 525 (1980); *id.* at 594, 100 S.Ct. at 1898 (Powell, J., concurring). Appellees have not raised the issue, and indeed they would probably lack standing to do so, since each of the three companies was on actual notice and participated in the comment proceedings that accompanied the promulgation of these regulations. *Cf. Natural Resources Defense Council, Inc. v. EPA,* 673 F.2d 400, 406-07 (D.C.Cir.), *cert. denied,* 459 U.S. 879, 103 S.Ct. 175, 74 L.Ed.2d 143 (1982).

* Where appropriate, such inquiries often entangle courts in the somewhat paradoxical endeavor of considering the merits of a dispute—for instance, whether a regulation is substantively valid as an emission standard or invalid as a work practice standard—in order to ascertain whether jurisdiction over the dispute exists in the first place. This intertwining of substantive and jurisdictional issues, however, is not an uncommon feature of answering the jurisdictional question. *See, e.g., E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 125, 97 S.Ct. 965, 973, 51 L.Ed.2d 204 (1977); *Louisiana Chemical Ass'n v. Bingham,* 657 F.2d 777, 782 & n. 7 (5th Cir. 1981).

> We are aware of the possible dangers that flow from this interpretation; district courts will be importuned, under the guise of making a determination as to whether a regulation is an "emission standard," to engage in judicial review in a manner that is precluded by § 307(b)(2) of the Act. This they may not do. The narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding. The question is only whether the regulation which the defendant is alleged to have violated is on its face an "emission standard" within the broad limits of the congressional meaning of that term.

434 U.S. at 285, 98 S.Ct. at 573. In answering this question, we have no trouble labeling the regulations as emission rather than work practice standards since each sets a "no discharge" cap on the amount of vinyl chloride and polyvinyl chloride that can be emitted. Where the regulations can be violated only by transgressions of this purely numerical discharge requirement, it cannot be said that the regulations are not on their face emission standards, or, more to the point, that the Administrator's characterization of them as such is unreasonable, *see, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* —— U.S. ——, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 121, 93 S.Ct. 2080, 2095, 36 L.Ed.2d 772 (1973); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969); *Udall v. Tallman,* 380 U.S. 1, 16-17, 85 S.Ct. 792,

801, 13 L.Ed.2d 616 (1965); *PPG Industries v. Harrison*, 660 F.2d 628, 633 (5th Cir.1981). *Accord Luckie*, 752 F.2d at 456-57; *Borden*, 572 F.Supp. at 691.

Thus, to the extent section 307(b) requires us to determine as a preliminary matter whether these EPA regulations are emission standards, we hold for purposes of that jurisdictional inquiry that they are. The district court was consequently without jurisdiction to pass on the substantive validity of sections 61.64(a)(3) and 61.65(a) under the Clean Air Act, and the government, *qua* cleaner, may press its suit.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA
BATON ROUGE, LOUISIANA

Civil Action No. 83-723-A

UNITED STATES OF AMERICA

versus

OCCIDENTAL CHEMICAL CORP., *et al*

PROCEEDINGS

THE HONORABLE JOHN V. PARKER, Chief Judge, Presiding

Friday, October 7, 1983

APPEARANCES:

Ms. SHELLY ZWICK and Ms. RUTH ANN MCQUADE
For the United States of America

HORACE C. LANE, ESQ. and GARY BAISE, ESQ.
For Occidental Chemical Corporation

R. GORDON KEAN, JR., ESQ. and STEPHEN LIVINGSTON, ESQ.
For Firestone Tire and Rubber Company

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[3] FRIDAY, OCTOBER 7, 1983

(Case was called and proceedings were begun.)

MR. KEAN: May it please the Court, before we commence argument on the motions, may I address the Court?

THE COURT: Yes, indeed.

MR. KEAN: I would respectfully request that Mr. Stephen Livingston of the firm of Thompson & Knight in Dallas, Texas, be enrolled as counsel of record for Occidental Chemical Corporation and further request that Mr. Livingston be permitted to argue the motions today on behalf of Occidental.

THE COURT: All right. He certainly will be accepted as counsel for Occidental.

MS. ZWICK: Similarly, Your Honor, —Shelly Zwick for the United States of America—I would like to introduce to the Court at this time Ms. Ruth Ann McQuade from the Department of Justice, Land and Natural Resources Section, who, with the Court's permission, will present oral argument on behalf of the Government today.

THE COURT: All right; we will accept Ms. McQuade.

MS. MC QUADE: Good morning, Your Honor. As you know, the United States filed a complaint against Occidental and Firestone on July 7, 1983; and since that time, the defendants have filed motions to dismiss; and we responded in opposition to the motions to dismiss and also asked, at [4] that time, for an expedited hearing on a stay of the proceedings, including the defendants' motions to dismiss. There appears to be no dispute that it's within your discretion to grant a stay of these proceedings pending——

THE COURT: But what do we really accomplish, Ms. McQuade, by granting the stay of proceedings?

MS. MC QUADE: Well, by doing so and waiting until a final decision in the *Ethyl* case, then you prevent both the defendants and the plaintiffs from having to go forward with this case on idential issues to the decision in *Ethyl.*

THE COURT: Well, it—All right; proceed.

MS. MC QUADE: The Supreme Court recognized, in *Landis versus North American Company,* 299US248, 1936, that the interests of judicial economy may be served by staying proceedings in actions at a lower court level where a pending decision by the appellate court in another case may substantially affect the result of the state action. And clearly, in light of the pending action or the appeal in the *Ethyl* decision, with nearly identical issues which will be controlling precedent in the case before us, it would conserve the resources of the litigants; it would conserve the resources of the court; no prejudice would ensue to the defendants during the pendency of the appeal; no further obligations; and by granting this stay, again, I think that all of the resources would be conserved at that point.

[5] THE COURT: Do you agree that the issues involved here are identical to those in the *Ethyl* case?

MS. MC QUADE: Well, they involve the same section in the code, yes, sir; 40CFR61.65(a). However, in the *Ethyl* case, there were not any reporting violations, as there are here.

THE COURT: Right; I understand. All right; let's see what the defendants have to say about your suggested stay and the motions to dismiss.

MR. LANE: May it please the Court, I'm Horace Lane. I'd like to introduce Mr. Gary Baise of the Washington, D.C. bar, who will speak for Firestone.

THE COURT: All right.

MR. BAISE: Your Honor, may it please the Court, I'm Gary Baise. I must admit this is one of the few times I have ever seen plaintiff move for a stay in an action. Certainly, it's one of the few times I've ever seen the Government immensely concerned about conserving judicial resources and litigants' resources. If the Government were so concerned about conserving resources, ——

THE COURT: Excuse me, just a moment.

MR. BAISE: Sure.

(Court conferred off-record with the law clerk.)

THE COURT: Proceed.

MR. BAISE: If the Government were so concerned [6] about conserving litigants' resources, it seems to me it could have held off for another year and a half before the statute of limitations would have run in this case, anyway. Secondly, when the Government says that there's no harm that befalls the defendants, that's just wrong. First off, Firestone has to list this case as having been filed by the Government with the Securities and Exchange Commission; obviously, it does not want to have this case hanging around and have to—necessarily have to list it in its 10-K, in January of next year. So there is some potential harm to Firestone, from that standpoint. Secondly, the *Ethyl* case is on appeal, we think. However, so far as I know, in my discussions with Ms. McQuade, the Solicitor General of the United States has not authorized the appeal with respect to this matter. And I would like to know, from the Government, whether or not there has——

THE COURT: Well, is that a necessary step?

MR. BAISE: There's been a notice filed and I had personally called Ms. McQuade to attempt to determine whether or not the Government is going to proceed, but I don't know that for a fact. Now, maybe she can clarify

the record at this point and tell us the Government is, indeed, going to appeal. And finally, with respect to the—even if the Government is going to appeal, Firestone certainly—and Occidental—does not want to have a situation where it has [7] to depend solely on the representations of Ethyl and its counsel with respect to an issue which may have considerable impact on Firestone. So we think we're entitled to——

THE COURT: In other words, you would rather do something more than just file an amicus brief in the Fifth Circuit?

MR. BAISE: That's right; because, particularly, in this case—as you know from the filings we have presented to the Court—we have submitted additional memoranda from EPA which interperts this 61.65(a); and frankly, I submit to you, Your Honor, that's why the Government wants to stay this case. They don't want the material we have submitted to go up to the Court of Appeals at this point. So that's why——

THE COURT: Well, I wouldn't accuse the Government of playing dirty pool.

MR. BAISE: Well, I'm not accusing; I just said I submit, for your consideration. So for all those reasons, Your Honor, we think this matter shouldn't be stayed. And we would request, based on the Court's earlier opinion in *Ethyl*, the additional memoranda we have submitted to the Court, which clearly spells out exactly how EPA interprets this regulation, that we proceed with the hearing on the motion to dismiss.

THE COURT: Have you seen this Massachusetts [8] district court decision——

MR. BAISE: Yes, I have.

THE COURT: —that the Government has presented us with?

MR. BAISE: Yes. And clearly—and I talked to local counsel with respect to that case yesterday, Your Honor—from what I can gather and from talking to him and, also, reading the case, your brethren on the bench there did not have before him the—certainly, the memoranda that we have placed before you. It is unclear as to whether or not this court even had the Barber memoradum, which is mentioned in the *Ethyl* case, before it. So I think there is a good deal of factual information which would distinguish that judgment from the one before you. You clearly have a more complete record before you than that court had before it, based on my present understanding.

THE COURT: In other words, you conclude, as the Government has said, "respectfully, that this case was wrong,"—the one from Massachusetts?

MR. BAISE: That's right.

THE COURT: And that this court should not follow that case in deciding this case?

MR. BAISE: I think not; because you have a much better record before you than, apparently, that court had before it.

[9] THE COURT: All right; I——

MR. BAISE: And after we finish arguing this matter with respect to the motion to dismiss, Your Honor, I suspect that I will provide you with some additional information which will assist you in buttressing any opinion you want to issue with respect to this case which will, in turn, buttress the *Ethyl* opinion.

THE COURT: All right; let's see what Occidental has to say.

MR. LIVINGSTON: Stephen Livingston for Occidental, Your Honor. I have very little to add except I would like to point out that the primary argument of the Govern-

ment, in favor of a stay as opposed to a dismissal, is that it will conserve the resources of the parties, not having to participate in an appeal. Well, the Government and, probably, these same attorneys are going to be participating in that appeal; so they are speaking for us, I guess, on our behalf to tell us that we ought to be able to conserve our resources. And I would like to say, on behalf of Occidental, that we'd like to be up there on that appeal; and we don't want to have our resources conserved while this question is being decided in the Fifth Circuit by other parties. We'd like to participate in that appeal.

THE COURT: You, I take it, have the same view about the Massachusetts decision; that it's——

[10] MR. LIVINGSTON: Yes, Your Honor.

THE COURT: — interesting, but not binding?

MR. LIVINGSTON: Yes, Your Honor.

THE COURT: All right. Does the Government have anything more to offer? Let me say, I have glanced through this opinion from the Massachusetts Court and, certainly, the judge up there, as he certainly is entitled to, did not agree with the conclusion that I came to in the *Ethyl* case. I have not changed my mind relative to the *Ethyl* case and, being convinced that the issues are identical, my inclination is to grant the motions to dismiss. I think that it would be desirable for us to take that course as opposed to the stay because I think that the Fifth Circuit would be better off having all views expressed on an appeal; and, certainly, there's nothing that I know of that would stop a consolidation. As a matter of fact, their rules would require consolidation of these cases, the *Ethyl* case and this case, for the handling of the appeal. And since I'm not going to change my mind, I really don't see any need in perpetuating the situation down here. I don't see anything to be gained by it. If you can tell me something else, I'll be glad to listen to it.

MS. MC QUADE: Well, I primarily wanted to clarify a point raised by the defendants on whether or not, in fact, an appeal has been filed. A notice of appeal was filed on [11] August 29th, and a briefing schedule has been set and the United States' brief is due, I believe, on the 7th of November; so that, in fact, that is going forward. I'd also like to point out that the United States did not have any devious motivation in applying for this stay and——

THE COURT: I'm sure that you didn't.

MS. MC QUADE: —sought not to prevent them from their appealing the case. And I will just state, on the *Borden* decision by Judge Mazoni, that it's unclear, at this point, what documents he had before him in making that decision. So I think it's premature to say that his decision was not based on all the facts, as defendants would claim.

THE COURT: Well, I would—You have something to add, Ms. Zwick?

MS. ZWICK: I just wanted to mention something to Ms. McQuade.

THE COURT: All right.

(Off-record discussion between Ms. Zwick and Ms. McQuade.)

MS. MC QUADE: Your Honor, you referred to being inclined to grant the motions to dismiss. We haven't talked about the issue raised about attorneys' fees in that same motion to dismiss. Are you treating those separately or together?

THE COURT: Well, I'm treating them pretty much [12] together. I've read the motions; I've read everybody's arguments on attorneys' fees; and I will tell you that my feeling about the attorneys' fees is that the

Government is not unreasonable in bringing the actions. I can see some argument—particularly, in Firestone's case, since Firestone doesn't even have the plant any more and could not possibly pollute the atmosphere because it doesn't have the pollution material available—but I don't really think that it was unreasonable. The Government certainly is free to disagree with the conclusion that I came to in the *Ethyl* case; the Government is certainly free to appeal that decision; and it's certainly free to take a different position in other courts and in this court. Obviously, that decision doesn't bind anybody but me; and it's binding on me only because I feel that it's correct. So it's not really binding precedent, anyway and so I certainly don't see that the Government was unreasonable; and I don't think the defendants are entitled to attorneys' fees. I will let them try to convince me otherwise, if they think they can, in a few minutes. But there's——

MS. MC QUADE: Thank you, Your Honor.

THE COURT: —no need for you to address it because I'm certainly convinced that the Government ought not to be required to pay attorneys' fees.

MS. MC QUADE: We certainly agree with that; thank [13] you.

THE COURT: I'm sure that you do. Is there anything new that you folks can address on the question of attorneys' fees? I think you heard what I just told Ms. McQuade; that's the way I look at it. And I think that, under the circumstances, it was not an unreasonable act by the Government to initiate these cases.

MR. BAISE: Your Honor, may I address this point and one other additional point?

THE COURT: Yes.

MR. BAISE: As I said earlier, it seemed to me that the Government could have waited for some considerable period of time—at least a year and a half—before it brought its case against Firestone. By that time, surely, it would have had its decision in Ethyl. Remember, they brought the case against Firestone some seven days after you handed down your decision. The Government makes a good deal about the term "harassment" coming from the legislative history relating to the attorneys' fees section.

THE COURT: Well, I don't think they're harassing you and I——

MR. BAISE: No; let me——

THE COURT: —don't think harassment is a requirement. I agree that it's a question of——

MR. BAISE: Well, that's what the——

[14] THE COURT: —reasonableness——

MR. BAISE: —legislative history says——

THE COURT: —and I think that until they get an appellate decision, finalizing this question, I think the Government is entitlted to continue to file actions and take the position that their regulations are valid and enforceable. I don't—I think they would probably be derelict to take a district court decision and let that be the final word. I think they owe more to their own regulations than to do that. So I just don't think it's unreasonable for them to file additional suits.

MR. BAISE: I don't think it's probably unreasonable for them to file additional suits in other cases. I think it, clearly, is unreasonable with respect to the *Firestone* case. And let me just bring one other additional point to your attention——

THE COURT: Well, there is some merit in what you say simply because you have sold the plant and——

MR. BAISE: That's right. We're no longer in business, that's Number One. Number Two, they had a year and a half. And Number Three—something that's not brought out in the briefs—that this industry now, for some several years, has been trying to negotiate with EPA with respect to what this relief valve discharge regulation means. And in fact, some two and a half months ago, the now [15] Deputy Assistant Administrator for Air Programs, Mr. Sheldon Meyers, invited this industry, of which Firestone used to be a part, to submit its views on the relief valve discharge issue to the agency for consideration. I don't know whether anything will come from that. But the fact is and the important thing is, that there has been an invitation from the Government to review this, to look at this, and, possibly, engage in negotiations with respect to this particular section of the regulations. So I'm not sure whether Ms. McQuade is aware of that because that is a different section of the agency. But it seems to me, when you look at the fact that—if she doesn't, she should —the Government is inviting us, at our suggestion, to relook at this issue; then, go ahead and file a case like this against Firestone—a company out of business, in this particular area; a year and a half to go; negotiations ongoing—then it does become unreasonable. So those are the points I'd like for you to consider.

THE COURT: Well, I appreciate the points.

MR. BAISE: Sure.

THE COURT: I am still not convinced, though, because I think that, as long as they're going to sue Occidental, they might as well piggyback you along with them. And I just don't think it's unreasonable to do that. And it's not necessary for you to write any long opinion or [16] findings or anything in this case. Basing my conclusion on the case that I decided in *United States v. Ethyl Corporation,* I sustain the motion to dismiss for both defendants; I

deny the motion for the stay; and I deny attorneys' fees to either defendant. Thank you.

MR. LANE: Thank you, Your Honor.

MS. ZWICK: Thank you.

MR. BAISE: Thank you, Your Honor.

(Proceedings were concluded.)

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I hereby certify that the above and foregoing is a true and correct transcript from the record of the proceedings in this matter, heard before The Honorable John V. Parker, Chief Judge, on Friday, October 7, 1983, to the best of my knowledge and ability.

October 24, 1983

/s/ HELEN BAZZELL
Helen Bazzell
Official Court Reporter

I certify transcript fees and format comply with those prescribed by Court and Judicial Conference of the U.S.

/s/ HELEN BAZZELL
Helen Bazzell
Official Court Reporter
United States District Court
Middle District of Louisiana

UNITED STATES DISTRICT COURT, M.D. LOUISIANA.

Civ. A. No. 83-0120-A.

UNITED STATES OF AMERICA

v.

ETHYL CORPORATION.

July 1, 1983.

United States brought action against the company, alleging violation of regulations governing the emergency discharges of vinyl chloride. On the company's motion to dismiss, the District Court, John V. Parker, Chief Judge, held that Environmental Protection Agency regulations which govern emergency discharges of vinyl chloride and which require compliance with work practices set out by the EPA were work practice standards, despite their designation as emissions standards, and because the regulations were promulgated prior to the 1977 amendments to the Clean Air Act which authorized the Administrator to enforce work practice standards, the regulations were unenforceable by the District Court.

Motion granted.

Ian Hipwell, Asst. U.S. Atty., Baton Rouge, La., for plaintiff.

Ronald A. Seale, Seale, Smith & Phelps, Baton Rouge, La., for defendant.

JOHN V. PARKER, Chief Judge.

This matter is presently before the court on defendant's motion to dismiss for failure to state a claim upon which relief can be granted. Each side has urged its position in oral argument and has submitted additional briefs on issues raised in argument. After carefully considering all the arguments and conducting its own research, the court concludes that it has no choice but to grant the motion.

The complaint alleges that Ethyl Corporation discharged vinyl chloride on at least 98 separate occasions over a six year period from 1977 to 1982 from its Baton Rouge, Louisiana, plant, all in violation of the Clean Air Act, 42 U.S.C. § 7401, *et seq.* Specifically, the complaint alleges that Ethyl discharged at least 168,622.7 pounds of vinyl chloride to the atmosphere from relief valves on equipment in vinyl chloride service on at least 81 separate occasions—all in violation of 40 C.F.R. § 61.65(a). That regulation provides that

> Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge.

In addition, Ethyl additionally manually vented gas containing at least 14,596 pounds of vinyl chloride from valves on polyvinyl chloride reactors on 17 separate occasions, thereby violating 40 C.F.R. § 61.64(a)(3)--which again prohibits discharges which could "have been avoided by taking measures to prevent" them. The complaint seeks to enjoin Ethyl from future violations of the vinyl chloride regulations and to require that Ethyl develop and implement a plan to prevent future discharges of vinyl chloride. The government also seeks a civil penalty

of $25,000 for each day that Ethyl violated the regulations at issue.

The enforceability of these regulations depends upon their characterization as "emission standards" or "work practice" standards. Making that deceptively simple characterization first requires a journey through the labyrinths of the Clean Air Act.

Under Section 112 of the Clean Air Act the Administrator of the Environmental Protection Agency (EPA) is authorized to promulgate regulations setting emission standards for hazardous air pollutants. 42 U.S.C. § 7412. A "hazardous air pollutant" presently is defined as one "to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. § 7412(a)(1).

The Administrator designated vinyl chloride[1] a hazardous air pollutant in December, 1975. 40 Fed.Reg. 59477. In October, 1976, he promulgated the emissions standards for vinyl chloride. 41 Fed.Reg. 46560, now codified at 40 C.F.R. § 61.60 *et seq.*

Discharging an air pollutant in violation of the applicable emission standard is prohibited under Section 112(c)(1)(B) of the Clean Air Act. 42 U.S.C. § 7412(c)(1)(B). That violation subjects the violator to civil penalties and an injunction under 42 U.S.C. § 7413(b)(3). And the last

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[1] For a discussion of vinyl chloride, its uses in industry and its effects upon those who are exposed to it, *see, e.g., Society of the Plastics Industry, Inc. v. Occupational Safety & Health Administration*, 509 F.2d 1301 (2d Cir.1975); Doniger, *Federal Regulation of Vinyl Chloride: A Short Course in the Law and Policy of Toxic Substances Control*, 7 Ecology L.Q. 497 (1978).

passageway in this matrix lead to the controversial jurisdictional bar. Under Section 307(b) of the Act:

> (b)(1) A petition for review of action of the Administrator in promulgating any . . . emission standard or requirement under Section 7412 . . . may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section . . . 7412(c) . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.
>
> . . . . .
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. 42 U.S.C. § 7607.

The reference to "requirement" in 42 U.S.C. § 7607(b)(1) was added in the 1977 technical amendments. Pub.L. No. 95-190, 91 Stat. 1399. Prior to that time, the Administrator's authority, the enforcement provisions, and the jurisdictional limits all were couched in terms of "emissions standards." (*See e.g.*, § 112(b)(1)(B), as exacted in 1970, Pub.L. No. 91-604, 84 Stat. 1676, § 112(b)(1)(B) (1970) which authorized the setting of "emission standards.") That language caused a split in lower court decisions on whether work practice requirements were permitted under the Act. Congress soon thereafter added Section 112(e) which authorized work practice standards where "it is not feasible to prescribe or enforce an emission standard." 42 U.S.C. § 7412(e)(1) (West Supp. 1978). This standard is set out in terms of "a design, equipment, work practice, or operational standard, or combination thereof" rather than in terms of limiting emissions. 42

U.S.C. § 1712(e)(1) (West Supp.1978). The Supreme Court, in *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 98 S.Ct. 566, 54 L.Ed.2d 538 (1978) interpreted this sequence of events as an indication that authority to issue requirements—or work practice standards—did not exist prior to the 1977 amendments. 434 U.S. at 283-84, 98 S.Ct. at 572.

Curiously, however, while the 1977 amendments gave the Administrator the authority to promulgate work practice regulations, he seemingly had no authority to enforce them—the enforcement provision referred only to violations of "emission standards." 42 U.S.C. § 7413(b); 434 U.S. at 306, 98 S.Ct. at 583. Congress again reacted and added 42 U.S.C. § 7412(e)(5) in 1978 which provides that "[a]ny design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as an emission standard for purposes of the provisions of this chapter"; *i.e.,* a work practice standard equals an emissions standard for purposes of enforcement. Pub.L. No. 95-623.

In *PPG Industries v. Harrison,* 660 F.2d 628, 636 (5th Cir.1981), the court cited *Adamo* and held that the EPA had authority to issue only emission standards before the 1977 amendments. While *PPG* concerned Section 111 of the Act, the issues were analogous to that of the instant case—whether the contested regulation was a work practice standard, and, if so, whether it was enforceable since it was enacted prior to the 1977 amendments. The court determined that the regulation was "a work practice or operation standard beyond the statutory authority of the EPA" and such requirements are enforceable only if promulgated subsequent to the 1977 amendments. *Id.* While the Administrator reminds us that we may not consider the sufficiency of the regulation and argues that it is indeed an emission standard, we note the words of Justice Rehnquist in *Adamo Wrecking,* "Congress . . . did not em-

power the Administrator, after the manner of Humpty Dumpty in Through the Looking-Glass, to make a regulation an emission standard by his mere designation." 434 U.S. at 283, 98 S.Ct. at 572. Section 307 of the Act bars judicial review of the sufficiency or appropriateness of a regulation, but it does not bar the narrow inquiry as to "whether the regulation which the defendant is alleged to have violated is on its face 'an emission standard' within the broad limits of the congressional meaning of that term." 434 U.S. at 287, 98 S.Ct. at 573.

The regulations governing emergency discharges of vinyl chloride were promulgated in October, 1976, prior to the 1977 amendments. 41 Fed.Reg. 46560, now codified at 40 C.F.R. § 6160 *et seq.*; specifically, 40 C.F.R. §§ 61.65(a) and 61.64(a)(3). Thus, those regulations may be enforced by this court only if they are in fact emission standards and not work practice regulations camouflaged under the rubic of "emission standards."

Apparently, the two regulations covering emergency discharges of vinyl chloride have been used for little but gathering dust since their enactment. Few cases discuss the work practice/emissions limitations dichotomy, and even fewer concern vinyl chloride regulations.[2] The one reported

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[2] While virtually no jurisprudence exists on this issue, a few commentators have discussed the vinyl chloride regulations. Two commentators writing after the *Adamo* decision characterized the vinyl chloride standards as work practice standards which would have to be repromulgated under the 1977 amendements. Citing § 61.65 specifically, Doniger matter of factly describes it as specifying "the use of certain equipment and operational techniques." Doniger, *supra*, at 566. (See other references to work practice regulations for vinyl chloride at p. 567, n. 360; p. 568 n. 361; and p. 578.) Another commentator wrote that in some situations, a quantitative limit on emissions "is not practical, either because measurement techniques are available, or because emissions come from many small points in a process and are most easily controlled by

case discovered mentions the regulations at issue here, but that case was dismissed on other grounds. *Hooker Chemical Company v. United States Environmental Protection Agency,* 642 F.2d 48 (3d Cir.1981). Both sides have referred to a case subsequently arising out of that litigation, *United States of America v. Tenneco Chemicals,* No. 80-4141 (D. N.J. July 6, 1981), where the court, in an unpublished opinion, disposed of numerous defenses raised by Tenneco again under the same provision at issue here, but the court did not mention whether the regulation was challenged as being a work practice regulation. Thus the court now finds itself in the uneasy position of plowing not really new ground, but ground that has lain dormant these many years.

The government argues that 40 C.F.R. §§ 61.65(a) and 61.64(a)(3)[3] are emission standards setting a quantifiable limit of zero emissions but which also allow the violator to assert an affirmative defense of emergency discharge under certain conditions.

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numerous equipment or work practice measures at those points. The 1973 asbestos standard and the 1976 vinyl chloride standard both included such measures." ENVIRONMENTAL LAW INSTITUTE, *Design, Equipment, Work Practice or Operational Standards: The 1977 Amendments and Adamo Wrecking Co.,* in AIR AND WATER POLLUTION CONTROL LAW: 1980 at 183 (Wetstone, ed. 1980).

[3] 61.65(a) *Relief valve discharge.* Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge *which could not have been avoided by taking measures to prevent the discharge.* Within 10 days of any relief valve discharge, the owner or operator of the source from which the relief valve discharge occurs shall submit to the Administrator a report in writing containing information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss

Ethyl responds that the regulations, while phrased in terms of no discharge, indirectly require the use of certain work practices. The regulations actually allow nonquantifiable discharges of vinyl chloride, provided certain work practices and operational techniques are observed.

An emission standard is to be distinguished from a work practice standard. An emission "standard is a quantitative 'level' to be attained by use of 'techniques,' 'controls,' and 'technology'." *Adamo Wrecking Co. v. United States,* 434 U.S. at 286, 98 S.Ct. at 573. When "it is not feasible to prescribe or enforce an emission standard," the Administrator is now authorized to enact a "design, equipment, work practice, or operational standard." 42 U.S.C. § 7412 (e)(1). The regulation at issue in *Adamo* had been proposed originally as a limit on emissions of zero.[4]

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during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges.

61.64(a)(3) Manual vent valve discharge: Except for an emergency manual vent valve discharge, there is to be no discharge to the atmosphere from any manual vent valve on a polyvinyl chloride reactor in vinyl chloride service. *An emergency manual vent valve discharge means a discharge to the atmosphere which could not have been avoided by taking measures to prevent the discharge.* Within 10 days of any discharge to the atmosphere from any manual vent valve, the owner or operator of the source from which the discharge occurs shall submit to the Administrator a report in writing containing the information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges. (Emphasis added)

[4] "Zero" emissions are possible under the Act. See S.Rep. No. 1196, 91st Cong., 2d Sess. at 20 (1970) and Senate Comm. on Public works, "Summary of the Provisions of Conference Agreement

The Administrator concluded, however, after examining the situation, that it would often be impossible to preclude all visible emissions of asbestos during the course of demolition. He chose instead to regulate work practices during demolitions. *Adamo Wrecking Co. v. United States, supra,* 434 U.S. at 287, 98 S.Ct. at 574. Ethyl argues that the defendant in *Adamo* had two choices: He could have zero emissions or he could comply with the work practices required by the regulations. Ethyl contends it has the same two choices: It may have zero emissions or it may comply with the instructions set out by EPA in the preamble to the regulations, which describe the "measures" required by EPA to prevent "avoidable" discharges:

> A zero emission limit is being proposed for relief discharges which can be prevented. In most cases, such discharges from reactors can be prevented by measures including, but not limited to, properly instrumenting the reactors to detect upset conditions, injecting chemicals to stop the polymerization reaction during upset conditions, venting the reactor contents to a gasholder during upset conditions and ultimately to a recovery system, providing employees with improved training on preventing and handling upset conditions, and utilizing a stand-by source of power. For other pieces of equipment, increasing pressure due to inert gases in the system can be relieved by manual venting to a gasholder or recovery system. The conditions which lead to discharges can also be prevented in most cases by proper handling and transfer of vinyl chloride or materials containing vinyl chloride. Discharges which cannot be avoided by taking such preventive measures, such as those caused by natural disaster, will not be

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on the Clean Air Amendments of 1970," reprinted in A Legislative History of the Clean Air Amendments of 1970, Ser. No. 93-18, 93rd Cong., 2d Sess. at 133 (1974)

> in violation of the proposed standard if the owner or operator notifies EPA within 10 days concerning the nature and cause of the discharge. This notification provision is necessary to permit EPA to investigate the surrounding conditions and determine whether the discharge could have been prevented. 40 Fed.Reg. 59539.

Plainly the Administrator does not limit "emergency" to earthquake, tornado, flood or other natural disaster, for the regulations themselves speak in terms of discharges which could not have been avoided by taking "measures." The court can only conclude that the regulations equate "measures" to "work practices" and the Agency's posture in *United States v. Tenneco Chemicals, Inc., supra,* fortifies this conclusion. The court there noted that EPA had instructed Tenneco that only emergency discharges of vinyl chloride that could not have been prevented by taking certain precautions were allowed. A letter from EPA had advised Tenneco that the company must demonstrate that discharges could not have been prevented by implementing any of the following procedures:

(1) employee training programs, including instructions on emergency procedures;

(2) proper inspection and maintenance programs (including replacement of relief valve seals on a sufficiently frequent basis in order to prevent their rupture);

(3) proper design and operation of process and control equipment; and

(4) installation and operation of all control equipment needed to comply with the vinyl chloride standard.

Each of the "measures" to which EPA made reference relates to "design, equipment, work practice, or operational standard, or combination thereof," the definition of work practice. 42 U.S.C. § 7412(c).

Ethyl argues, therefore, that the court's determination of whether a source has violated the emergency discharge regulations will be based not on the quantity of what is emitted but on whether the source has implemented the measures required by the EPA.

Exactly what constitutes an "emergency" or an "avoidable discharge" is unclear. The government argues that that very uncertainty is what renders this regulation an emissions limitation. The government continues that Ethyl is limited to zero emissions by whatever method it chooses; it is allowed, however, to discharge in an emergency—an argument which takes this court in a circle, right back to the definition of "emergency." What the regulation actually says is that unavoidable discharges are those which could not be avoided by the application of work practices.

A commentator discussing the enactment of the Clean Air Act emphasized the need to construe the Act as a whole. The "attainment of ambient air quality," he quoted from Senate Reports, "is possible only through the enforcement of precise and objective emission controls." Jorling, *The Federal Law Pollution Control,* in FEDERAL ENVIRONMENT LAW 1101 (E. Dolgin and T. Guilbert, eds. 1974). An emission standard, according to the Senate Report and the commentator's opinion, had to be one capable of being enforced without "reanalysis of technological or other considerations; . . . an objective evidentiary standard would have to be met." *Id.* at 1102. Once standards are set their violation "should be a relatively clear evidentiary matter." *Id.* at 1107.

The need for prompt enforcement of regulations which are violated, the court's lack of technological and scientific expertise, the time and study which should preface the promulgation of a regulation—all support the wisdom behind the Congressional intent that emission standards, when finally set, should establish a numerical limit requiring little of the court but its power to enforce compliance

after an obvious violation. The 1977 amendment setting out the procedure for promulgating work practice operations likewise has at its base the necessity for clear, objective regulations setting out precise requirements that must be met in certain situations. 42 U.S.C. § 7412(e).

These emergency discharge regulations do not meet those goals of clarity and ease of enforcement. The court is aware, of course, that it may not look into the sufficiency of a regulation promulgated by the Administrator. If these regulations are emissions standards, they must be enforced no matter how poorly drafted.

Sections 69.65(a) and 61.64(a)(3), however, require the use of "measures" to avoid emitting vinyl chloride. It is true that these measures are not set out with specificity as is required under the 1977 amendments, but they nevertheless do require compliance with work practices set out, however vaguely, by the EPA. The conclusion is inescapable that these regulations, despite being designated as emission standards by the Administrator, are work practice standards within the meaning of the Act. Compliance with these elusive work practices renders any discharge "unavoidable" and thus non-violative of the regulations. Since they are work practice regulations promulgated prior to the 1977 amendments, they are unenforceable by this court.

Accordingly, defendant's motion to dismiss for failure to state a claim upon which relief can be granted is hereby GRANTED.

APPENDIX B

CLEAN AIR ACT

42 U.S.C. § 7412. NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

(a) Definitions

For purposes of this section—

(1) The term "hazardous air pollutant" means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(2) The term "new source" means a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source.

(3) The terms "stationary source", "modification", "owner or operator" and ""existing source" shall have the same meaning as such terms have under section 7411(a) of this title.

(b) List of hazardous air pollutants; emission standards; pollution control techniques

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section.

(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such

pollutant together with a notice of a public hearing within thirty days. Not later than 180 days after such publication, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

(C) Any emission standard established pursuant to this section shall become effective upon promulgation.

(2) The Administrator shall, from time to time, issue information on pollution control techniques for air pollutants subject to the provisions of this section.

(c) Prohibited acts; exemption

(1) After the effective date of any emission standard under this section—

(A) no person may construct any new source or modify any existing source which, in the Administrator's judgment, will emit an air pollutant to which such standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(i) such standard shall not apply until 90 days after its effective date, and

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply

with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(2) The President may exempt any stationary source from compliance with paragraph (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may be extended for one or more additional periods, each period not to exceed two years. The President shall make a report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(d) State implementation and enforcement

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

(e) Design, equipment, work practice, and operational standards

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pol-

lutant or pollutants, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in his judgment is adequate to protect the public health from such pollutant or pollutants with an ample margin of safety. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that (A) a hazardous pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equvalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this

subsection shall be treated as an emission standard for purposes of the provisions of this chapter (other than the provisions of this subsection).

(July 14, 1955, c. 360, Title I, § 112, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1685, and amended Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 109(d)(2), 110, Title IV, § 401(c), 91 Stat. 701, 703, 791; Nov. 9, 1978, Pub.L. 95-623, § 13(b), 92 Stat. 3458.)

CLEAN AIR ACT

42 U.S.C. § 7413

(b) Violations by owners or operators of major stationary sources

The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement; or

(3) violates section 7411(e), section 7412(c), section 1857c-10(g) of this title (as in effect before August 7, 1977), subsection (d)(5) of this section (relating to coal conversion), section 7624 of this title (relating to cost of certain vapor recovery), section 7419 of this title (relating to smelter orders), or any regulation under part B of this subchapter (relating to ozone); or

(4) fails or refuses to comply with any requirement of section 7414 of this title or subsection (d) of this section; or

(5) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

The Administrator may commence a civil action for recovery of any noncompliance penalty under section 7420

of this title or for recovery of any nonpayment penalty for which any person is liable under section 7420 of this title or for both. Any action under this subsection may be brought in the district court of the United States for the district in which the violation occurred or in which the defendant resides or has his principal place of business, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty and to collect any noncompliance penalty (and nonpayment penalty) owed under section 7420 of this title. In determining the amount of any civil penalty to be assessed under this subsection, the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.

(c) Penalties

(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order under section 7419 of this title or under subsection (a) or (d) of this section, or

(C) violates section 7411(e), section 7412(c) of this title, or

(D) violates any requirement of section 1857c-10(g) of this title (as in effect before August 7, 1977), subsection (b)(7) or (d)(5) of section 7420 of this title (relating to noncompliance penalties), or any requirement of part B of this subchapter (relating to ozone)[1]

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

CLEAN AIR ACT

42 U.S.C. § 7607

ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW

* * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United

States Court of Appeals for the District of Columbia if such action is based on a determinaton of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

* * *

APPENDIX C

CLEAN AIR ACT REGULATIONS

* * *

40 C.F.R. § 61.65 Emission standard for ethylene dichloride, vinyl chloride and polyvinyl chloride plants.

An owner or operator of an ethylene dichloride, vinyl chloride, and/or polyvinyl chloride plant shall comply with the requirements of this section.

(a) *Relief valve discharge.* Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge. Within 10 days of any relief valve discharge, the owner or operator of the source from which the relief valve discharge occurs shall submit to the Administrator a report in writing containing information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges.

APPENDIX D

MEMORANDUM

SUBJECT: Vinyl Chloride Relief Valve Discharge From PVC Reactors-Borden Chemical

FROM: Director
Division of Stationary Source Enforcement

TO: Lawrence H. Goldman, Chief, Enforcement Branch Region I

This is in response to your memo of March 29, 1979, requesting guidance on what constitutes a "preventable" relief valve discharge under 40 CFR 61.65(a) and on what steps a source can be expected to take in order to prevent the occurrence or recurrence of relief valve discharges.

When a source reports a relief valve discharge we should presume that the discharge was not due to an emergency, but was preventable and is therefore a violation of Section 61.65(a). The source will then have the opportunity to demonstrate otherwise. In order for a discharge to be considered an emergency, the source would have to demonstrate that it could not reasonably have been expected to anticipate the discharge and then to prevent or contain it. As a minimum, the source would have to demonstrate that the discharge could not have been prevented by implementing any of the

1) employee training programs including instruction on emergency procedures,

2) equipment inspection and maintenance programs,

3) proper design and operation of process and control equipment, and

4) installation and operation of all control equipment needed to comply with the vinyl chloride standard.

One factor which should be taken into consideration in determining whether a discharge could have been anticipated and therefore prevented, is the plant's prior history with respect to discharges. If the source has previously experienced one or more discharges, some or all of which were caused by the same factor, the source is expected to have taken corrective measures designed to prevent or contain future discharges.

In summary, a relief valve discharge is a violation of Section 61.65(a) if it could have been anticipated and preventive measures could have been taken or if the discharge could have been prevented by properly training employees or by properly operating, maintaining and inspecting equipment.

In particular, your memo requested guidance on what constitutes a preventable operator error. As is the case with other discharges, we should presume each discharge to have been preventable and then provide the source with the opportunity to demonstrate otherwise. As a minimum, the source would have to demonstrate that operators were well-trained initially and had received refresher training courses, as necessary, to cover both normal and upset conditions. Refresher courses should have been provided particularly after the occurrence of an initial relief discharge caused by operator error. The source should be able to provide documentation as to the dates training was offered and the operations covered.

The final issue to be addressed in this memo concerns the types of actions a source should be expected to take, after experiencing a relief valve discharge, in order to prevent future discharges. The preamble to the proposed vinyl chloride standard lists, on page 59539, several measures a source can reasonably be expected to take to prevent relief valve discharges. Measures which can be taken to prevent discharges from PVC reactors include, but are not limited to, the following:

1) properly instrumenting the reactors to detect upset conditions,

2) injecting chemicals to stop the polymerization reaction during upset conditions,

3) Venting the reactor contents to a gasholder during upset conditions and ultimately to a recovery system,

4) providing employees with improved training on preventing and handling upset conditions, and

5) maintaining a backup source of power. *See* 40 FR 59539, December 24, 1975.

It is apparent from this discussion that in developing the vinyl chloride regulations we envisioned the use of gasholders to prevent or contain relief valve discharges. Therefore, Borden Chemical and any other PVC manufacturer can reasonably be expected to install gasholders to prevent discharges if other preventive measures, implemented in a timely manner, fail. In fact some PVC manufacturers have already installed gasholders for this purpose.

Should you have any further questions on this issue, please contact Libby Scopino at 735-2564.

Edward E. Reich

cc: Susan Wyatt, ESED
Marsha Spink, Region I
Marcus Kantz, Region II
Peter Schaul, Region III
Leon Polson, Region IV
Bruce Varner, Region V
Martin Brittain, Region VI
Paula Bisson, Region IX

Enforcement Division Directors, Region I-IV & IX

DSSE:EN-341:LScopino:ncb:tr12:4/23/79

[SEAL]

Washington, D.C. 20x50

Office of
Air, Noise, and Radiation

[Mar 14, 1980]

SUBJECT: Vinyl Chloride Standard-Safety Relief Valve Discharges

FROM: David B. Hawkins, Assistant Administrator for Air, Noise, and Radiation

TO: Rebecca Hanmer, Regional Administrator Region IV

This is in regard to John White's request in the December Senior Management Report for better guidance on control of vinyl chloride emissions from safety relief valve discharges. I understand that the regional offices in general have had difficulties in enforcing section 61.65(a) of the vinyl chloride standard which deals with relief valve discharges. I also understand that the number of relief valve discharges reported during the enforcement of the standard has been greater than may have been expected. This concerns me because of the large amount of emissions which can occur during one of these discharges.

The vinyl chloride standard is scheduled for review in 1981, five years from the original promulgation date. We are already beginning to develop a work plan for review of that standard. During the review of the standard, my staff plans to focus on the part of the regulation dealing with relief valve discharges. An effort will be made to identify any new developments in technology for control of these discharges. Also, my staff will contact the offices and obtain data on the frequency and causes of relief valve discharges which have occurred and evaluate alter-

native ways of writing this part of the standard to improve its clarity and effectiveness.

The following paragraphs provide information on the development of the regulation for relief valve discharges and guidance on the interpretation of it.

Section 61.65(a) of the vinyl chloride standard states that "Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service." An emergency relief discharge is defined as "a discharge which could not have been avoided by taking measures to prevent the discharge."

Although the regulation covers any relief valve on any equipment that contains at least 10 percent vinyl chloride, and is located in a vinyl chloride or polyvinyl chloride plant, the primary intent of the regulation was to substantially reduce the number of relief valve discharges from polyvinyl chloride reactors. At the time the regulation was being developed, relief valve discharges from polyvinyl chloride reactors were a common occurrence and we were aware of specific means that could be implemented to prevent these discharges. Relief valve discharges from other equipment occurred much less frequently and we did not include in our background documents specific information on how they can be prevented. They were included in the regulation, however, to ensure that emissions from these relief valves did not occur unnecessarily. Our intention was that primary attention be focused on the polyvinyl chloride reactor discharges which are the largest source of emissions and for which we had described specific preventive measures.

The information we obtained during the development of the standard indicated that the frequency of relief valve discharges from polyvinyl chloride reactors varies considerably from plant to plant. Some plants had less than one

discharge per year; others had twenty or more. On the average, 5000 pounds of vinyl chloride was emitted from one of the discharges within a five to ten minute period.

Relief valve discharges from polyvinyl chloride reactors occur in order to prevent catastrophic rupture when pressure within the reactor builds up beyond the capabilities of the reactor to contain it. The production of polyvinyl chloride from vinyl chloride in reactors is an exothermic reaction. Reactors are equipped with agitators and cooling jackets to remove the heat due to the exothermic reaction. Pressure buildups in reactors can occur if the cooling equipment does not operate properly; this can happen if there is a power outage for example. It can also occur if the operator adds too much vinyl chloride or some other ingredient to the reactor during formulation of a batch.

In order to prevent discharges, several steps can be taken. For example, reactors can be equipped with temperature or pressure sensing devices. When high temperature or pressure is detected, chemicals can be manually or automatically added to the reactor to stop the reaction. Provisions can be made to remove enough of the contents of a reactor batch to another vessel so that the pressure is brought back down to a satisfactory level before it is necessary for the relief valve to discharge. Back-up power sources can also be provided to keep agitators operating during main power outages. Some of the newer plants contain computerized systems which automatically fill reactors with the proper quantity of each ingredient and which contain provisions for altering operations when overpressure is detected. Newer plants with computerized systems tend to have fewer discharges. These are several examples of preventive measures which had been demonstrated in existing plants at the time of development of the standard.

Not all relief valve discharges can be prevented. The intent of the regulation was that if a plant took steps such as those named above and still had a relief valve discharge, that relief valve discharge would be considered an emergency condition and would not be a violation. We expected such situations to be rare.

We did not specifically require that each plant take all of the preventive measures described above for a couple of reasons. First, some plants were having very few discharges (less than one per year) already without taking all of the above named steps. It did not appear prudent to require plants to unnecessarily install expensive equipment when they were preventing the discharges without it. There were wide variations among plants. Some contained numerous older, smaller reactors, while others contained large, more modern reactors. Relief valve discharges are much more easily controlled from the newer and larger reactors than from the older and smaller reactors. In addition, we did not want to preclude the development of improved technology which may be even more successful in preventing discharges than the technology available at the time we developed the regulation.

The intention of the regulation was that each plant install sufficient preventive equipment to reduce the number of polyvinyl chloride reactor discharges to a very small number. For plants who report essentially no discharges, no additional equipment would be required. However, for plants who do report discharges, more and more preventive measures would be required through enforcement actions until the occurrence of discharges from any one plant is rare.

I hope this information is useful to you. If you have additional questions, comments, or suggestions, please contact me.

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Nos. 85-334 and 85-376

Supreme Court, U.S.
FILED
DEC 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FIRESTONE TIRE & RUBBER COMPANY AND OCCIDENTAL CHEMICAL CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ETHYL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant in a civil enforcement action can challenge the validity of an EPA regulation, even though Section 307(b)(2) of the Clean Air Act, 42 U.S.C. 7607(b)(2), precludes review of the validity of EPA regulations in enforcement proceedings.

2. If we assume that facial review of the validity of a regulation is permissible in an enforcement proceeding, whether the court of appeals correctly concluded that a regulation calling for no discharge of vinyl chloride from relief valves except in an unpreventable emergency is an emission standard within the meaning of Section 112(b) of the Clear Air Act, 42 U.S.C. 7412(b).

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 761 F.2d 1153. The decision of the district court in *United States* v. *Ethyl Corporation* (Pet. App. 24a-35a) is reported at 576 F. Supp. 80. The decision of the district court in *United States* v. *Occidental Chemical Corp.* (Pet. App. 12a-23a) is unreported.

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[1]Pet. App. references are to the petitioners' appendix in No. 85-334.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1985. The petition for a writ of certiorari in No. 85-334 was filed on August 28, 1985. The petition for a writ of certiorari in No. 85-376 was filed on August 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the 1970 amendments to the Clean Air Act (Pub. L. No. 91-604, 84 Stat. 1676 *et seq.)* Congress authorized the Administrator of the Environmental Protection Agency (EPA) to promulgate national emission standards for hazardous air pollutants. § 112(b)(1)(B), 42 U.S.C. 7412(b)(1)(B). Under the statute, the Administrator is to publish a list of hazardous air pollutants and to prescribe an emission standard for such pollutants. 42 U.S.C. 4712(b)(1)(B). An "emission standard" is a "quantitative 'level' to be attained by the use of 'techniques,' 'controls,' and technology.' " *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 286 (1978). Emission standards differ from "work practice standards," which prescribe techniques, controls, and technology to be used rather than establishing a quantitative emission level that must be attained. The Administrator is to "establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health." 42 U.S.C. 7412(b)(1)(B).[2]

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[2]In 1977 Congress amended Section 112 (42 U.S.C. 7412) to authorize the promulgation of work practice standards if "it is not feasible" to prescribe a numerical emission limitation because the hazardous pollutant cannot be emitted through a conveyance or cannot be measured. § 112(e)(1) and (2), 42 U.S.C. 7412(e)(1) and (2). The Section authorizes the Administrator to promulgate a "design, equipment, work practice or operational standard" if it is not feasible to prescribe or enforce a numerical emission limitation. 42 U.S.C. 7412(e)(1).

In 1970 Congress also provided for judicial review of the Administrator's action in promulgating emission standards for hazardous air pollutants. Section 307(b)(1), 42 U.S.C. 7607(b)(1), requires a petition for review "of action of the Administrator in promulgating * * * any emission standard" under Section 112(b)(1)(B) to be filed "only in the United States Court of Appeals for the District of Columbia" within 30 days of the Administrator's action.[3] Any action of the Administrator "with respect to which review could have been obtained" under Section 307(b)(1) is not subject to judicial review in "civil or criminal proceedings for enforcement." § 307(b)(2), 42 U.S.C. 7607(b)(2). Section 307(b)(2) is commonly known as the "preclusive review" provision of the Clean Air Act.

2. Vinyl chloride was listed as a hazardous air pollutant pursuant to Section 112(b)(1)(A) (42 U.S.C. 7412(b)(1)(A)) in December 1975. 40 Fed. Reg. 59477-59478 (1975). Evidence had accumulated in the early 1970s showing that vinyl chloride was associated with a rare form of liver cancer, liver angiosarcoma. The preamble to EPA's proposed rulemaking summarized the health data on vinyl chloride exposure. It stated that workers in vinyl chloride plants were shown to experience 3,000 times the risk of developing angiosarcoma as the general population and that animal studies showed angiosarcoma at exposure levels of 50 parts per million (ppm).[4] People living in the immediate vicinity of vinyl chloride plants in 1974 experienced "occasional peak exposure of as high as 33 ppm." 40

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[3]The 1977 amendments to the Clean Air Act enlarged the time in which review may be sought to 60 days. 42 U.S.C. 7607(b)(1).

[4]The Occupational Safety and Health Administration promulgated regulations governing worker exposure to vinyl chloride in 1974. See *Society of the Plastics Industry, Inc.* v. *OSHA*, 509 F.2d 1301 (2d Cir.), cert. denied, 421 U.S. 992 (1975).

Fed. Reg. 59523-59533 (1975). EPA therefore proposed standards for vinyl chloride emissions, including emissions from relief valves. See 40 Fed. Reg. 59536, 59545-59546 (1975). The proposed regulations provided for "no discharge to the atmosphere from any relief valve" except for an emergency. 40 Fed. Reg. 50545 (1975). The preamble to the proposed regulations explained that a "zero emission limit is being proposed for relief discharges which can be prevented." 40 Fed. Reg. 59539 (1975).

In response to the notice of proposed rulemaking, 24 vinyl chloride companies submitted comments, including petitioners Ethyl Corporation, Firestone Plastics Co., and the predecessor of Occidental Chemical Corporation. 41 Fed. Reg. 46560, 46561 (1976). Several industry comments were directed to the proposed relief valve regulations.[5] The final relief valve regulations were slightly modified versions of the proposed regulations. They provide that there be no discharges from automatic or manual relief valves "except for an emergency" discharge. The regulations define an emergency discharge as one that could not have been prevented "by taking measures to avoid the discharges." 40 C.F.R. 61.64(a)(3), 61.65(a). They also require companies to notify the EPA of relief valve discharges within 10 days of their occurrence. The final regulations were promulgated on October 21, 1976, and became applicable to existing sources on January 20, 1977. 41 Fed. Reg. 46560 (1976). See § 112(c)(1)(A), 42 U.S.C. 7412(c)(1)(A). No action challenging the final relief valve regulations was filed in the District of Columbia Circuit.

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[5]Petitioner Firestone argued that a negligence standard should be employed in determining whether relief valve discharges attributable to operator error were preventable. II Office of Waste Management, U.S. Environmental Protection Agency, *EPA-450/2-75-009b, Standard Support and Environmental Impact Statement,* at 2-47 (1976).

3. a. A civil enforcement action against the Ethyl Corporation was commenced in February 1983. The complaint sought civil penalties and an injunction to remedy repeated relief valve discharges of vinyl chloride from the company's facility at Baton Rouge, Louisiana. The complaint alleged 81 discharges from automatic relief valves, in violation of 40 C.F.R. 61.65(a), totalling 168,622.7 pounds of vinyl chloride between March 18, 1977, and April 30, 1982. It also charged the company with 17 discharges from manual relief valves, in violation of 40 C.F.R. 61.64(a)(3), totalling 14,596 pounds of vinyl chloride between July 14, 1978, and January 11, 1982. Pet. App. 25a. The complaint requested civil penalties and an injunction to require Ethyl Corporation to develop and implement a remedial program to prevent future vinyl chloride discharges.

In April 1983 Ethyl filed a motion to dismiss, claiming that the relief valve regulations constituted work practice standards which were unauthorized by the Clean Air Act when the regulations were promulgated in 1976. Accordingly, the company claimed that the regulations were unenforceable as a matter of law. The district court, relying on *Adamo Wrecking,* ruled that it had jurisdiction, despite the preclusive review provision, to determine whether the relief valve regulations were emission standards within the meaning of the Clean Air Act (Pet. App. 28a-29a). It then ruled that the relief valve regulations are work practice standards because the trial court, in an enforcement action, would have to inquire into the measures the company employed to avoid emergencies in order to determine whether there had been a violation. Accordingly, the district court declared the relief valve standards unenforceable and dismissed the case. Pet. App. 32a-35a.

b. A civil enforcement action against Occidental Chemical Corporation and Firestone Tire and Rubber Company was commenced in July 1983 (Pet. App. 13a). Occidental

owns and operates a polyvinyl chloride plant in Addis, West Baton Rouge Parish, Louisiana. It purchased this plant in November 1980 from Firestone Tire and Rubber Company, which owned and operated the plant prior to that date. The complaint alleged that Firestone discharged a total of approximately 5,011 pounds of vinyl chloride from relief valves, in violation of 40 C.F.R. 61.65(a), in 21 episodes between March and October of 1980. It further alleged that Occidental discharged a total of 2,120 pounds of vinyl chloride on nine occasions between January 1981 and February 1982. In addition, the complaint charged that Firestone, on all 21 occasions, and Occidental, on two occasions, failed to report relief valve discharges in the 10-day period specified in 40 C.F.R. 61.65(a).

Firestone and Occidental filed motions to dismiss the complaint based upon the district court's decision in the *Ethyl* case. In response, the government filed a motion to stay proceedings pending the outcome of its appeal in the *Ethyl* case. The district court denied the stay motion, and dismissed the action without issuing an opinion. Pet. App. 22a-23a.

4. The court of appeals consolidated the two cases and reversed. The court ruled that Section 307(b)(2) on its face divested the district court of jurisdiction over petitioners' challenge to the relief valve regulations (Pet. App. 5a). It further ruled that this Court's decision in *Adamo Wrecking* is limited to criminal prosecutions, so that the Court's holding that a district court in a criminal enforcement action may determine whether or not the regulation that the defendant allegedly violated is on its face an "emission standard" does not extend to these civil enforcements actions (Pet. App. 5a-9a).[6] The court of appeals also found

[6]The court noted that the companies had not invoked considerations of due process to escape the preclusive effect of Section 307(b)(2) and that they probably lacked standing to do so since they all participated in the rulemaking proceedings in 1976 (Pet. App. 8a-9a n.8).

that if *Adamo Wrecking* applied so that a limited inquiry into the relief valve regulations was warranted, the regulations were on their face emission standards (Pet. App. 9a-10a).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.[7]

1. Petitioners' major submission is that the court of appeals erred in refusing to apply *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275 (1978), to these civil enforcement actions. In *Adamo Wrecking,* this Court held that a defendant in a criminal prosecution brought to enforce asbestos regulations promulgated under the Clean Air Act could raise the issue of "whether the regulation which the defendant is alleged to have violated is on its face an 'emission standard' " (434 U.S. at 285). The Court stressed that the reviewing court in such a case is to conduct a "narrow inquiry" (*ibid.*).[8]

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[7]Since the court of appeals reversed and remanded for trial, petitioners' contentions are not yet ripe for review. If petitioners prevail at their trials, their contentions will be moot. If, on the other hand, they are held liable for damages and those determinations are upheld on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. For this reason as well, review by this Court is unwarranted.

[8]The issue on the merits in this case differs substantially from that decided in *Adamo Wrecking.* In *Adamo Wrecking,* the government admitted that the contested regulation was a "work practice" standard. See Brief for the United States at 5, 28-29. The question considered by the Court, therefore, was whether a work practice standard constituted an emission standard within the meaning of the statute. In the present case, the government does not consider the vinyl chloride relief valve regulations to be "work practice" standards. Accordingly, petitioners' claims here required the courts to determine whether the relief valve

The short answer to petitioners' argument is that the court of appeals afforded the petitioners the inquiry mandated by *Adamo Wrecking* in criminal cases in reversing the district court. The court of appeals held that, to the extent a "limited inquiry is warranted" for jurisdictional purposes (Pet. App. 9a & n.9), it "had no trouble labeling the regulations as emission * * * standards" since they set "a 'no discharge' cap on the amount of vinyl chloride" that can be emitted (*id.* at 10a). The court's resolution of this question—that the regulations are emission standards rather than work practice standards--is in conformity with the decisions of all the other lower federal courts (excluding the district court here) that have considered the matter. *United States* v. *Borden, Inc.*, 572 F. Supp. 684 (D. Mass. 1983); *United States* v. *Conoco, Inc.*, No. 83-1916-E (W.D. Okla. Jan. 23, 1984); *United States* v. *B.F. Goodrich Co.*, 609 F. Supp. 1 (W.D. Ky. 1984). Thus, if a federal court must review the facial validity of a regulation in a civil enforcement action under the Clean Air Act, that review was afforded petitioners by the Fifth Circuit, which held, in conformity with the decisions of three district courts, that the relief valve regulations are emission standards.[9]

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regulations should be interpreted as "work practice" standards contrary to the interpretation of the Administrator. In such circumstances, the interpretation of the Administrator is normally entitled to deference. See, *e.g.*, *Chemical Manufacturers Ass'n* v. *NRDC*, No. 83-1013 (Feb. 17, 1985), slip op. 9-10; *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-6.

[9]Moreover, because this interpretation helps to effectuate the purposes of the Act, it has properly been adopted by the courts. As this Court explained in resolving a similar definitional question under the Federal Food, Drug, and Cosmetic Act, "the 'natural way' to draw the line 'is in light of the statutory purpose.' " *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969), quoting *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 124-125 (1953).

As Firestone's submission demonstrates (Pet. 11-14), petitioners seek far more than facial review of the vinyl chloride relief valve regulations. Firestone submits enforcement memoranda as evidence that the regulations should be interpreted as work practice standards (*id.* at 11-12), and relies upon the injunctive relief sought in the complaints to show that measures were necessary to comply with the regulations (*id.* at 13). Such evidence, of course, is irrelevant to the "facial inquiry" petitioners purport to seek. More significantly, use of such materials could convert any Clean Air Act regulation into a work practice standard. All emission standards require measures—installation of equipment or changes in operating procedures—for their attainment. An individualized study of the measures taken by a polluter and the possible additional procedures and equipment available to reduce emissions is relevant to the decision to take enforcement action and to the formulation of the appropriate form of injunctive relief to request.[10] If consideration of such matters shows that the regulation sought to be enforced is a "work practice standard," then many Clean Air Act regulations promulgated before 1977 may be subject to invalidation.

In short, the court of appeals afforded petitioners the limited inquiry into the facial validity of the relief valve regulations that they purport to seek. Moreover, since the 1977 amendments to the Clean Air Act, the Administrator

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[10]For example, in *United States* v. *West Penn Power Co.*, 460 F. Supp. 1305, 1307 (W.D. Pa. 1978), the United States brought action to enforce a requirement that a power plant not "emit sulfur dioxide in excess of .6 pounds per million BTU." The relief requested by the United States was an order directing that a flue gas desulferization system be installed (*id.* at 1307-1308), and such an order was entered by the district court (*id.* at 1319). Cf. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 318 (1982) (creation of compliance orders under the Clean Water Act).

has been authorized to promulgate work practice standards. See note 2, *supra*. Hence, the distinction between emission standards and work practice standards is of limited significance for the future. As a result, there is no substantial reason for this Court to review the universal conclusion that the vinyl chloride relief valve regulations are valid on their face as emission standards.[11]

2. In addition, it is not clear that even a facial inquiry is appropriate in a civil enforcement action. This Court rested its holding *Adamo Wrecking* on the "stringent sanctions," including imprisonment, which may be imposed for criminal violations of the Clean Air Act (434 U.S. at 283). The Court stressed that Congress had created a number of special rules regarding criminal liability under the Act and that it has "imposed *civil* liability for a wider range of violations of the orders of the Administrator than those for which it has imposed *criminal* liability" (*id.* at 282 (emphasis in original)). Moreover, invoking the rule of lenity, a standard of statutory construction used only in criminal cases, this Court ruled that, if there were doubts, they were to be "resolved in favor of the defendant" (*id.* at 285 (citation omitted)).

As the court of appeals concluded, "the Court rested its holding in *Adamo Wrecking* on the nature of a criminal prosecution" and its rationales are not "applicable in the context of civil proceedings" (Pet. App. 6a-7a). In contrast to the rule of lenity, deference is to be afforded the interpretations of the Administrator concerning EPA's statutes and

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[11]Ethyl attacks (Pet. 14-15) the court of appeals' footnote (Pet. App. 8a-9a n.8) suggesting that the petitioners would probably lack standing to raise a due process claim because they commented on the regulations at the time of their promulgation. Ethyl's contention that the court's footnote creates a constitutional problem under the equal protection component of the Due Process Clause is without merit since petitioners never raised a due process claim below.

regulations in civil actions. *Train* v. *NRDC,* 421 U.S. 60, 75 (1975); see *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). As the Court noted in *Adamo Wrecking,* Congress imposed civil liability for a wide variety of violations of the Act. And, of course, imprisonment cannot be imposed in a civil enforcement action.

Petitioners argue that criminal standards should be applied to these civil enforcement actions because they are indistinguishable from criminal actions. Petitioner Firestone claims (Pet. 7) that there is no meaningful difference between civil and criminal proceedings under the Clean Air Act because the maximum daily penalty or fine specified in Act, $25,000 a day, is the same under both civil and criminal enforcement provisions. § 113(b) and (c)(1), 42 U.S.C. 7413(b) and (c)(1). The civil enforcement provision, however, clearly empowers the Administrator to seek injunctions as well as to recover civil penalties (§ 113(b)), while the criminal provisions state that a knowing violator may "be punished by a fine * * * or by imprisonment for not more than one year, or by both" for a first offense (§ 113(c)(1)). Thus, there are significant differences.

Petitioner Ethyl (Pet. 7-8) contends that the civil actions should be analogized to criminal proceedings because the civil penalties sought are "penal" in nature. Petitioner ignores that the complaints filed by the government requested injunctive relief as well as civil penalties. Injunctive relief, of course, is addressed to the federal court sitting in equity and is entirely civil in nature. See *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305, 311-312 (1982). Moreover, analysis of the civil penalty provision of Section 113(b) compels the conclusion that it is not primarily punitive, see

United States v. *Ward*, 448 U.S. 242, 254 (1980), and has been administered to effectuate compensatory objectives.[12]

Petitioners also assert that, even if the present enforcement actions are found to be entirely civil in character, *Adamo Wrecking* and Section 307(b)(2) should be read to afford civil defendants the right to challenge the facial validity of the Administrator's regulations because federal statutes should be given the same construction in both civil and criminal applications. Petitioners rely primarily upon *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954) (85-334 Pet. 7-9; 85-376 Pet. 8), in making this argument. In that case the Court held that the phrase "any lottery, gift enterprise, or similar scheme" did not mean one thing in a criminal prosecution under 18 U.S.C. 1304 and something else in FCC regulations prohibiting violations of Section 1304 by broadcasters. 347 U.S. at 296 n.18. Nothing in the Court's opinion suggests that a facial inquiry into whether a regulation is an emission standard is required in both civil and criminal enforcement actions.[13]

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[12]The EPA Civil Penalty Policy calculates penalties within the statutory maximum by evaluation, inter alia, of the environmental damage involved, the economic benefit enjoyed by the violator through its noncompliance, and extraordinary enforcement costs incurred. See *EPA Civil Penalty Policy*, 8 Env't Rep. (BNA) 2011, 1012 (1978); see also 15 Env't Rep. (BNA) 885 (1984).

[13]Firestone notes (Pet. 8) that the Court stated that the construction of Section 1304 urged by the FCC "would likewise apply in criminal cases," contrary to the "well-established principle that penal statutes are to be construed strictly" (347 U.S. at 296). This case is obviously different since we are not suggesting that a facial inquiry into whether a particular regulation is an emission standard is not required in criminal cases; *Adamo Wrecking* forecloses such an argument. It does not follow from *FCC* v. *American Broadcasting Co., supra*, that a similar inquiry must be available in civil cases. That decision at most suggests a need for similarity of substantive statutory interpretation when the substantive issue is properly raised.

Accordingly, the court of appeals was entirely correct in holding that a facial inquiry into whether the vinyl chloride regulations are emission standards is not required in these civil enforcement cases. Having failed to raise the issue in challenging the regulations following their promulgation, petitioners are now precluded by Section 307(b)(2) from litigating the issue in civil enforcement proceedings. Moreover, this case is the first court of appeals decision concerning whether *Adamo Wrecking* applies to a civil enforcement proceeding pursuant to Section 113(b) of the Clean Air Act.[14] There will be an opportunity for this Court to review this question should there be a decision by another court of appeals in the future that conflicts with the court of appeals' decision in this case. Moreover, in the present case, the court of appeals, as an alternative ground for its decision, afforded petitioners *Adamo Wrecking*-type review and, as we have shown, its holding rejecting their claim on the merits does not warrant this Court's review. There is, accordingly, no occasion here for review of the *Adamo Wrecking* issue.

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[14]Contrary to petitioners' claims (85-334 Pet. 9; 85-376 Pet. 10), *Hooker Chemical Co.* v. *United States*, 642 F.2d 48 (3d Cir. 1981), is not in conflict with the court of appeals' decision. *Hooker Chemical Co.* was a Section 307(b)(1) challenge to an EPA order—not an enforcement proceeding—and the court's statements concerning *Adamo Wrecking* were mere dicta. See also *Luckie* v. *EPA*, 752 F.2d 454, 456-457 (9th Cir. 1985) (*Adamo Wrecking* is "inapplicable" in citizens suit under Section 304 (42 U.S.C. 7604) of the Act because "no criminal charges" are involved).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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